

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 582.

**THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR.**

VS.

MORRIS BEHRMAN.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

FILED OCTOBER 13, 1921.

(28537)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 582.

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR.

vs.

MORRIS BEHRMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original	Print
Writ of error	1	1
Clerk's certificate	4	1
Indictment	5	2
Demurrer	8	4
Judgment sustaining demurrer and memorandum, Sheppard, J.	10	5
Docket entries	11	6
Petition for allowance of writ	12	6
Assignment of errors	13	7
Citation and service	14	8

1 UNITED STATES OF AMERICA, 88:

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings and also in the rendition of the judgment of a plea which is in the District Court before you, or some of you, between the United States of America, plaintiff in error, and Morris Behrman, defendant in error, a manifest error hath happened to the great damage of the United States of America, plaintiff in error, as is said and appears by said judgment and the complaint of the said United States of America, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the Supreme Court of the United States at the Capitol at Washington, in the District of Columbia, together with this writ, so that you have the same at the said place before the judges aforesaid, on October 21, 1921, that the record and proceedings aforesaid, being inspected, the said judges of the Supreme Court of the United States may cause further to be done therein, to correct that error.

2 what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 22nd day of September, in the year of Our Lord, one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-sixth.

[L. S.]

ALEX. GILCHRIST, JR.,

*Clerk of the District Court of the
United States of America for the
Southern District of New York, in
the Second Circuit.*

The foregoing writ is hereby allowed.

WM. B. SHEPPARD,

U. S. District Judge.

3 United States Supreme Court. Court Docket No. 28/425.

The United States of America, plaintiff in error, *versus* Morris Behrman, defendant in error. Writ of error and allowance. William Hayward, United States Attorney, Attorney for U. S. Due service of a copy of the within is hereby admitted. New York, September 27, 1921. Bash & Kulkun, attorneys for defendant. Filed Sept. 22, 1921. U. S. District Court, S. D. of N. Y.

4 UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, Alex Gilchrist, jr., clerk of the District Court of the United States of America, for the Southern District of New York, in the

Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages numbered from 5 to 14 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The United States of America, plaintiff in error, against Morris Behrman, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 11th day of October, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-sixth.

[SEAL.]

ALEX GILCHRIST, JR.,

Clerk.

5

Indictment.

In the District Court of the United States of America for the
Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district, upon their oath, present:

That heretofore, to wit, on June 10, 1919, in the Borough of Manhattan, city, county, State and Southern District of New York and within the jurisdiction of this court, Morris Behrman, hereinafter called the defendant, did unlawfully sell, barter, and give to Willie King, a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit, 210 grains of cocaine, not in pursuance of any written order of the said Willie King on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that is to say, that at the time and place aforesaid the defendant being a physician duly licensed to practice as such and duly registered under the act of December 17, 1914, as amended by the act of February 24, 1919, did issue and give to the said Willie King three written orders in the form of prescriptions signed by him and which said orders called for the delivery to said Willie King of 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, respectively, the said heroin and morphine being derivatives of opium and the said cocaine being a derivative of coca leaves, as defendant then and there well knew; that at the time and place aforesaid, the defendant in issuing the said three orders in the form of prescriptions, and

6 giving same to the said Willie King, intended and purposed that the said Willie King would obtain the said drugs from a druggist upon said orders; that thereafter and at the place and on

the date aforesaid the said Willie King did obtain upon said orders, so issued and given to him by the defendant, from one Samuel Siegel, a duly licensed pharmacist registered under the act of December 17, 1914, as amended by the act of February 24, 1919, 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, which said drugs were obtained from the said Samuel Siegel pursuant to the said three orders in the form of prescriptions so issued by the defendant and not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that on said date the said Willie King was a person addicted to the habitual use of morphine, heroin, and cocaine and known by the defendant to be so addicted; that on said date the said Willie King did not require the administration of either morphine, heroin, or cocaine by reason of any disease or condition other than such addiction, and the defendant did not dispense said drugs or any of them to said Willie King for the purpose of treating any disease or condition other than such addiction; that none of the said drugs so dispensed by the defendant was administered or intended by the defendant to be administered to the said Willie King by the defendant or by any nurse or person, other than the said Willie King, acting under the direction of the defendant, nor were any of said drugs consumed or intended by the defendant to be consumed by the said Willie King in the presence of the defendant, but all of said drugs were put in the physical possession and control of the said Willie King with the intention on the part of the defendant that said Willie King would use same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed as aforesaid being more than sufficient or necessary to satisfy the craving of the said Willie King therefor if consumed by him all at one time; that said Willie King was not, at the time and place aforesaid, nor was he intended by the defendant to be, during the period in which the drugs dispensed as aforesaid were to be used by him, under the observation and physical control of the defendant or of any nurse or other person acting under the direction of the defendant, nor was said Willie King in any way restrained or prevented from disposing of said drugs in any manner he might see fit; that said drugs dispensed by the defendant to the said Willie King as aforesaid were not mixed with any other substance, medicinal or otherwise, but were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for such consumption; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 2 of the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130.)

WILLIAM HAYWARD,
United States Attorney.

Endorsed: Indictment. Giving, bartering, and selling morphine, heroin, and cocaine. (Act of December 17, 1914, as amended by the Act of February 24, 1919.) William Hayward, U. S. Attorney. A true bill: Louis W. Greeman, Foreman. U. S. District Court, S. D. of N. Y. Filed June 30, 1921.

1921:

Jul. 18 Deft. pleads not guilty Bail \$2500.

Filed demurrer

Sept. 21 Filed judgment sustaining demurrer and dismissing indictment.

" 22 Filed citation & writ of error U. S. Supreme Court

SHEPPARD, J.

8

Demurrer.

UNITED STATES DISTRICT COURT,

Southern District of New York:

THE UNITED STATES, PLAINTIFF, }
 against }
 MORRIS BEHRMAN, DEFENDANT. }

The above-named defendant hereby demurs to the indictment No. 28,425, filed against him in this court, on the grounds that it appears on the face thereof,

First. That the facts alleged in said indictment do not constitute a crime.

Second. That the facts alleged in said indictment do not constitute a crime, because they show that the selling and giving of the drugs were done by the defendant in his professional capacity as a duly licensed and registered physician, by dispensing said drugs by means of prescriptions therefor, which were filled by a druggist, and that said dispensing of the drugs, by the defendant, was to a patient, Willie King, in the course of his professional practice only, as defendant had a legal right to do under exception a, of section 2, of the act of December 17th, 1914, as amended.

Third. That the facts alleged in said indictment do not constitute a crime, because they show that the said selling and giving of the drugs were done by the said defendant in his professional capacity as a physician, by dispensing said drugs to a patient, Willie King, suffering from addiction to the drug dispensed, said dispensing being by means of prescriptions therefor, which were filled by a druggist,

9 there being no allegations in said indictment sufficient to show that the said defendant in dispensing said drugs was not dispensing same in the course of his professional practice only, as he had a legal right to do under exception a, of section 2, of said act of December 17th, 1914, as amended.

Fourth. That the facts alleged in said indictment do not constitute a crime, because it is not therein alleged that the defendant dispensed said drugs wilfully, and there is no allegation that the

defendant in dispensing said drugs acted with criminal intent, and no allegation from which it can be inferred that defendant acted wilfully or with criminal intent.

Fifth. That the facts alleged in said indictment do not constitute a crime, because they are consistent with defendant's innocence and an honest and sincere purpose and intention on his part to cure Willie King of his addiction to the use of the drugs dispensed, or to permanently better his physical condition due to such addiction.

Wherefore, the defendant asks judgment of the Court, that he be dismissed and discharged from the said premises specified in the said indictment.

Dated, New York, July 15th, 1921.

BASCH & KULKIN,

Attorneys for Defendant, O. & P. O. Address,

1265 Broadway, Borough of Manhattan, City of New York.

ARTHUR G. BASCH, *Of Counsel.*

U. S. District Court S. D. of N. Y. Filed July 18, 1921.

10 *Judgment sustaining demurrer and dismissing indictment and memorandum, Sheppard, D. J.*

UNITED STATES DISTRICT COURT,

Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

MORRIS BEHRMAN, DEFENDANT.

C. 28/425.

An indictment against Morris Behrman, the defendant above named, having been found and filed by the grand jurors in and for the Southern District of New York on June 30, 1921, and thereafter the defendant having been arraigned and having interposed a demurrer to said indictment on July 18, 1921, and thereafter Arthur G. Basch, Esq., having been heard in support of said demurrer, and Peter B. Olney, jr., assistant United States attorney, having been heard on behalf of the United States.

Now upon motion of Messrs. Basch & Kulkin, Esqs., attorneys for the defendant, it is

Ordered and adjudged that the demurrer be and the same hereby is sustained and the said indictment be and the same hereby is dismissed.

Dated: New York, September 21st, 1921.

WM. B. SHEPARD,

U. S. District Judge.

Memo:

In my opinion the so-called "ambulatory treatment" is a perversion of the spirit of the Harrison Act and contrary to the reason of the law. Prescriptions in the regular "course of practice" to a patient does not include the indiscriminate or continued doling out

of narcotics to addicts, on the pretense of treatment for the habit, but whether the prescription of the "practising physician in regular course" amounts to an infraction of the act depends on the particular facts of each case. The Webb and Doreaus cases cited in the briefs rule the question raised by this demurrer.

10a A different conclusion having been reached by Judge Knox in this district, for the sake of uniformity in this district, however, I am disposed to follow precedent until the question is concluded by a decision of the Supreme Court.

Service admitted. U. S. District Court, S. D. of N. Y. Filed Sept. 21, 1921.

11 *Docket entries.*

UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES	{	C 28-425. For defendant: Basch & Kulkin, 1265 Bway, Selling narcotics. Act 12-17-14.
<i>vs.</i>		
MORRIS BEHRMAN,		

1921:

Jun. 30. Filed indictment.

Jul. 18. Defendant pleads not guilty.

" 18. Filed demurrer.

Sep. 21. Filed judgment sustaining demurrer and dismissing indictment and memo., Sheppard, D. J.

" 22. Filed petition for allowance of writ of error.

" 22. Filed assignment of errors.

" 22. Filed citation U. S. Supreme Court, ret. Oct. 21, 1921.

" 22. Filed writ of error and allowance.

12 *Petition for allowance of writ of error.*

UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff in error,	{	Petition for allow- ance or writ of error.
<i>against</i>		
MORRIS BEHRMAN, Defendant in error.		

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above-named plaintiff in error, United States of America, by William Hayward, United States Attorney for the Southern District of New York, feeling aggrieved by the judgment entered herein on September 21, 1921, sustaining the demurrer to the indictment herein, and dismissing the said indictment, and which said judgment is based upon a construction of the statute upon which the said in-

dictment is founded, namely, the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 21, 1919, 40 U. S. Stat. L., p. 1130, petitions this court for an order allowing the United States of America to prosecute a writ of error to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herein, and the said United States of America prays that this writ of error will be allowed and that a transcript of the legal proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said court.

Dated: New York, N. Y., September 22, 1921.

WILLIAM HAYWARD,

United States Attorney for the Southern District of New York, Attorney for Plaintiff in error, United States of America. Office & P. O. address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Service admitted. U. S. District Court, S. D. of N. Y., filed Sep. 22, 1921.

13 UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF IN error, Against MORRIS BEHRMAN, DEFENDANT IN ERROR.	}	Assignments of Error.
--	---	-----------------------

Now comes the United States of America, plaintiff in error, by William Hayward, United States Attorney for the Southern District of New York, its attorney, and makes its assignments of error, respectfully showing that the court below erred in each of the following particulars:

1. In making its judgment sustaining the demurrer to the indictment herein, and dismissing the indictment against the above-named defendant in error.

2. In construing the statute upon which the indictment is founded, namely, the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130, so as to hold that the said indictment does not state a crime and is fatally defective, because it does not appear, from the allegations of said indictment, that the said acts therein alleged to have been done by the defendant, were done wilfully or with criminal intent.

3. In construing the said statute, so as to read into it the word "wilfully."

4. In construing the said statute, so as to hold that it does not forbid the acts of said indictment alleged to have been done by the said defendant, regardless of the purpose or intent of the defendant in doing said acts.

14 5. In construing the said statute, so as to hold that the acts therein alleged to have been done by the defendant were

or might have been done by him "in the course of his professional practice only."

Wherefore, plaintiff in error prays that said judgment be reversed and that such proceedings be thereafter had accordingly.

WILLIAM HAYWARD,

United States Attorney for the Southern District of New York, Attorney for Plaintiff in error, Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Service admitted. U. S. District Court, S. D. of N. Y. Filed, Sep. 22, 1921.

14a *By the Honorable William B. Sheppard, one of the judges of the District Court of the United States duly assigned to the Southern District of New York in the Second Circuit, to the defendant Morris Behrman, greeting:*

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at the Capitol at Washington, District of Columbia, on October 21st, 1921, pursuant to a writ of error filed in the office of the clerk of the United States District Court for the Southern District of New York, wherein the United States of America is plaintiff in error and Morris Behrman is defendant in error, to show cause if any there be, why the judgment sustaining the demurrer herein and dismissing the indictment found against the said Morris Behrman, defendant in error, in said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness: Honorable Learned Hand, United States District Judge for the Southern District of New York, at New York City, in the said Southern District of New York, this 22nd day of September, 1921.

WM. B. SHEPPARD,

United States District Judge.

15 United States Supreme Court. Court Docket No. 28 425.

The United States of America, plaintiff in error, versus Morris Behrman, defendant in error. Citation. William Hayward, United States Attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, September 27, 1921. Basch & Kulkin, attorneys for defendant. Filed Sep 22, 1921. U. S. District Court, S. D. of N. Y.

(Indorsed:) United States District Court, Southern District of New York. The United States of America against Morris Behrman. Transcript of record on writ of error.

(Indorsed on cover:) File No. 28,537. S. New York D. C. U. S. Terms No. 582. The United States of America, plaintiff in error, vs. Morris Behrman. Filed October 13th, 1921. File No. 28,537.